United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1150

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

STUART STEINBERG, JOHN PERLMAN, JEFFREY PREISMAN, WILLIAM CAPO, MICHAEL DURST, SUSAN WEINBLATT, STEPHEN EFFRON, HOWARD KAYE, STANLEY NICASTRO, JAMES PARKER, and JANE DOE, a/k/a SAM",

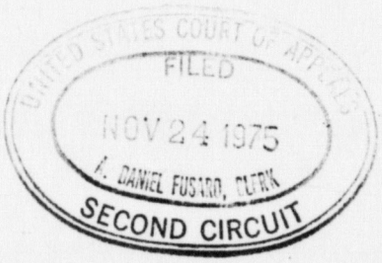
Defendants,

WILLIAM CAPO, HOWARD KAYE, JAMES PARKER, and STUART L. STEINBERG,

Defendants-Appellants.

Docket No. 75-1150

PETITION FOR REHEARING
FOR APPELLANT WILLIAM CAPO
WITH SUGGESTION FOR REHEARING EN BANC



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- STUART STEINBERG, JOHN PERLMAN, JEFFREY PREISMAN, WILLIAM CAPO, MICHAEL DURST, SUSAN WEINBLATT, STEPHEN EFFRON, HOWARD KAYE, STANLEY NICASTRO, JAMES PARKER, and JANE DOE, a/k/a "SAM", Defendants, WILLIAM CAPO, HOWARD KAYE, JAMES PARKER, and STUART STEINBERG, Defendants-Appellants.	Docket No. 75-1150

PETITION FOR REHEARING
FOR APPELLANT WILLIAM CAPO
WITH SUGGESTION FOR REHEARING EN BANC

Appellant William Capo seeks rehearing with a suggestion for rehearing en banc from a judgment of this Court (Moore, Friendly, and Van Graafeiland, C.JJ.) entered on November 10, 1975, affirming a judgment of the United States District Court for the Southern District of New York (Ward, D.J.) entered March 18, 1975. Appellant was convicted of

conspiracy to possess and distribute Schedule I, II, and III controlled substances (21 U.S.C. §§812, 841(a)(1) and (b)(1)(B)), three substantive counts of possession with intent to distribute the Schedule III controlled substance phencycladene hydrochloride (21 U.S.C. §§812, 841(a)(1) and (b)(1)(B)), and two counts of using the telephone to commit and facilitate the conspiracy (21 U.S.C. §6843(b)).

On appeal, appellant Capo challenged his conviction on the ground that all the prosecution's evidence against him was the product of wiretaps illegally conducted in that the application therefore did not comply with 18 U.S.C. §2518(1)(c), which requires:

> ... a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous....

Appellant seeks rehearing en banc on the grounds that the holding of the panel of this Court conflicts with the plain lanugage of the statute, it thwarts the accepted purpose of the legislation, and further that it is in direct conflict with a decision of the United States Court of Appeals for the Ninth Circuit.

I

The panel's holding creates a category of cases -- one in which the telephone is routinely used -- which is exempt from the statutory mandate that, before a wiretap order is granted, other investigative techniques must first be shown to be unavailable. With regard to establishing the future unavailability of these techniques,* the panel held:

> When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards....[Citations omitted.]
>
> Indeed, wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation.

Slip opinion 6433 at 6438.

This language, rather than requiring the Government to establish "unavailability" of other investigative techniques, as Congress explicitly directed, relieves the Government of the burden because it is a difficult one, and substitutes a showthat the wiretap is merely "appropriate." Since 18 U.S.C. §2518(1)(c) applies to all investigations in which the Government has authority to seek a wiretap, unavailability of other investigative techniques must be shown in all cases. The

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*The opinion acknowledges that the application for the wiretap order was deficient in that it failed to provide a factual basis upon which to conclude that normal investigative techniques had not sufficied in the past to expose the crime (slip opinion 6433 at 6437).

statute contains no exceptions for crimes in which the telephone is a frequent instrument of communication.

Moreover, unavailability is not established by a mere showing that the telephone is an implement of the criminal enterprise involved. Despite "routine" use of the telephone, other investigative methods, such as the use of informants, undercover agents, or physical surveillance, can be sufficiently productive of evidence to preclude resort to wiretapping. Because the opinion conflicts with the statutory requirement that the Government establish the unavailability of alternative investigative procedures, the petition must be granted.

The effect of this opinion is to reduce the possibility of arriving at a uniform basis upon which to grant a wiretap application. This is in contravention of the purpose of the procedures set forth in §2518 to:

> (1) [protect] the privacy of wire and oral communications and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of the wire and oral communications may be authorized.
>
> S.Rep. No. 1097, 90th Cong., 2d Sess.; 1968 U.S. Code & Admin. News,2112, 2154.

See also United States v. Kalustian, Docket No. 74-3314 (9th Cir., August 4, 1975), 17 Cr.L.R. 2428.* After cautioning

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*This opinion, not yet officially reported, is annexed hereto as "A." The Government's petition for rehearing, filed October 31, 1975, is still pending.

the Government that it would be well advised in the future to provide a more detailed factual statement of "unavailability" (slip opinion at 6438), the Court explicitly refuses to articulate any standard for what that statement should include. Compare United States v. Kalustian, supra ("A" at 6).

Incredibly, the Court goes on to suggest that the deficiencies in the Government's required statement are somehow mitigated by appellant's inability to suggest alternative investigative techniques. Apart from the fact that the opinion is in error that appellant could not suggest such alternatives,* the point is that appellant has no such obligation.

II

On September 12, 1975, appellant informed the panel by letter that, after oral argument in this case, the Court of Appeals for the Ninth Circuit, in United States v. Kalustian, 17 Cr.L.R. 2428, had analyzed the requirements of §2518(1)(c) and found insufficient an application for a wiretap order which was more complete and informative than the one filed in this case. The opinion of the panel makes no mention of Kalustian.

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*On appeal appellant Capo demonstrated that, on the facts of this case, both physical surveillance and the use of an informant were viable alternative means of investigation.

However, this Circuit should consider the rationale of Kalustian, for it properly accepts an approach to the issues raised in this case which are in accord with the intent of a Congress fearful of the dangers of broad wiretapping to limit the use of wiretaps to situations in which no other method of investigation was possible:

> The restraint with which such authority [to wiretap] was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in Berger [v. New York, 388 U.S. 41 (1967)], "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devides," 388 U.S. at 63.
>
> "A" at 4.

In Kalustian, Federal agents were investigating a bookmaking operation conducted over five telephones in three separate locations. The application for the wiretap, found there to be insufficient, provided, inter alia, that.

> 1. Named informants refused to testify at trial despite a grant of immunity;
>
> 2. Telephone toll records which are available are alone insufficient to prove gambling activities;
>
> 3. Physical surveillance and records already obtainable present little chance of securing presentable evidence.
>
> 4. Normal investigative procedures appear unlikely to succeed in the future -- gambling raids and searches have not in the past resulted in gathering physical evidence. Gamblers do not keep records, or if they do they are likely to be destroyed during a raid or once seized they are difficult to interpret.

In marked contrast, this case approves a wiretap appli-

cation merely because the affidavit established a drug conspiracy in which the telephone was frequently used and the source of supply was reluctant to meet the supposed purchaser.

The decision of the panel in this case approving the wiretapping procedure used fails to deal with concerns of the legislature. Such an approach is incorrect, for it destroys the scheme set by Congress to put wiretapping on the outer edge of proper investigatory techniques. Kalustian is correct, and its rationale needs to be adopted here as well.

CONCLUSION

For the above-stated reasons, the petition for rehearing and/or rehearing en banc should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*		
vs.		
KALE KALUSTIAN,	(74-3314)	OPINION
PATRICK DALE POND,	(74-3315)	
STANLEY NORMAN GRAY,	(74-3305)	
DAVID SELDITCH,	(74-3264)	
OTTO VINCENT MARINO,		
LEOPOLD OBEZO,		
MABLE LINDA CUCCIA, *Appellants.*	(74-3265)	

[August 4, 1975]

Appeal from the United States District Court
for the Central District of California

Before: ELY and HUFSTEDLER, Circuit Judges,
and SKOPIL,* District Judge

SKOPIL, District Judge:

Appellants seek review of their convictions for illegal gambling activities. 18 U.S.C. §§ 1955 and 2. They claim their motions for suppression of evidence were improperly denied. They also argue that there was insufficient evidence to sustain the verdicts.

According to the Government, confidential informants "advised" federal agents in 1971 that defendant Kalustian was operating a bookmaking operation from the Topper Club (Club) in Rosemead, California. Defendants Pond and Marino, among others, were identified as agents for the operation. On December 20, 1971, the Department of Justice sought court orders authorizing wire taps

*Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, sitting by designation.

on three telephones at the Club, one at defendant Stempke's residence, and one at the residence of Patricia Johnson. The application was authorized by Attorney General John Mitchell and granted on December 29, 1971. 18 U.S.C. § 2518(1)(c) provides that such applications shall include

> "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

The Government attempted to fulfill that requirement through affidavits supplied by Special FBI Agent James Brent (Affidavits), which essentially contained the following representations:

> "The informants named herein have all said that they will not testify to information they have provided, even if granted immunity. * * *
>
> "Experience has further established that even though telephone toll records are available which indicate a person is engaged in illicit gambling, the records themselves are not sufficient to prove the gambling activities. Standard investigative techniques have not succeeded in providing evidence to sustain prosecution in this case and would only succeed to a limited degree in establishing that Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, are involved in gambling activities over the telephone subscribed to in the name of the Topper Club. * * *
>
> "Furthermore, such investigative techniques as physical surveillance and the records obtainable on Kale Kalustian, also known as Kelly, Patrick Dale Pond, Otto Vincent Marino, Patricia Jackson, Bill Stempke, and others as yet unknown, contain little probability of success in securing presentable evidence. Based upon my knowledge and experience as a Special Agent of the Federal Bureau of Investigation in the investigation of gambling cases and my association with other Special Agents who have conducted investigation of gambling activities, normal investigative procedures appear to be unlikely to succeed in establishing that the above individuals are involved in gambling activities over the aforementioned telephones in violation of Federal laws. My experience and the

experience of other Agents has shown that gambling raids and searches of gamblers and gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offense. I have found through my experience and the experience of other Special Agents, who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers, immediately prior to or during a physical search, sometimes destroy the records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish elements of Federal offenses because such records are difficult to interpret, and many times are of little or no significance without further knowledge of the gamblers' activities. Therefore, the interception of these telephone communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove violation of these statutes. * * *

"Wherefore, because of the existence of facts and underlying circumstances of the continuing investigation listed above in paragraphs 4 through 32b, I submit that the probable cause as submitted in paragraphs 3a, 3b, and 3d exists; that the extensive normal investigative procedures tried, as set forth in paragraphs 4 through 32b, have failed to gather evidence necessary to sustain prosecution for violation of the offenses enumerated in paragraph 3a, and reasonably appear unlikely to succeed; * * *"

Appellants contend that their motions to suppress the wiretap evidence should have been granted because the Government's application did not satisfy 18 U.S.C. § 2518(1)(c). They argue that the supporting affidavits contain bald conclusions rather than facts from which the Attorney General and the judge could determine whether "normal investigative procedures" were viable alternatives to electronic surveillance. § 2518(3)(c).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Act), 18 U.S.C. §§ 2510 et seq. absolutely prohibits electronic surveillance by the federal government except under carefully defined circumstances and after securing judicial authority. Procedural steps provided in the Act require strict adherence.

United States v. Giordano, 94 S.Ct. 1820, 416 U.S. 505 (1974). The importance of these procedures reflects the dual purpose of Title III, which is to

> "(1) [protect] the privacy of wire and oral communications and (2) [delineate] on a uniform basis the circumstances and conditions under which the interception of the wire and oral communications may be authorized." S. Rep. No. 1097, 90th Cong., 2d Sess., 1968 U.S. Code Cong. & Admin. News 2112, 2154 (hereinafter cited as "History").

Title III was written to create limited authority for electronic surveillance in the investigation of specified crimes thought to lie within the province of organized criminal activity. History, pp. 2153-2163. It was designed to conform to prevailing constitutional standards. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in *Berger, supra*, "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices" 388 U.S. at 63.

Section 2518(1)(c) of the Act

> "is patterned after traditional search warrant practices and present English procedure in the issuance of warrants to wiretap by the Home Secretary. [citation omitted] The judgment [of the judge or magistrate] will involve a consideration of the facts and circumstances. * * * Merely because a normal investigative technique is theoretically possible it does not follow that it is likely. *See Giancana v. United States*, 352 F.2d 921 (7th Cir. 1965), cert. denied 382 U.S. 959; *New York v. Saperstein*, 2 N.Y. 210, 140 N.E.2d 252 (1957). What the provision envisions is that the showing be tested in a practical and commonsense fashion. Compare *United States v. Ventresca*, 380 U.S. 102 (1965)." History, p. 2190.

Our review of the wiretap authorization is limited. We are reminded that

> "[w]here [the underlying circumstances in the affidavit] are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by inter-

preting the affidavit in a hypertechnical, rather than a commonsense, manner." *United States v. Ventresca, supra* at 109.

Within our prescribed limits, however, the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III. The Act has been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny. *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973); *United States v. Cox*, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *United States v. Cox*, 462 F.2d 1293 (8th Cir. 1972). Our review of wiretap orders must ensure that the issuing magistrate properly performed his function and did not "serve merely as a rubber stamp for the police". *Ventresca, supra* at 109.

The affidavits set forth facts from which probable cause to infer the operation of a gambling conspiracy could be gleaned. Nearly all of these "facts" trickled into the ears of FBI agents through a series of professional gamblers and bookmakers moonlighting as stoolies for the Government. This colorful procedure of shuffling through stacks of hearsay and double hearsay reports from the "underworld" to construct an affidavit prompts some intriguing ethical questions. Unfortunately, as the affidavits attest, none of the Government's underworld journalists are quite willing to testify. Evidence of the telephone numbers used by the bookmaking operation and the identities of some of the conspirators could not successfully support a prosecution without that testimony.

Consequently the investigating officials decided electronic surveillance was imperative. They discarded alternative means of further investigation because "knowledge and experience" in investigating other gambling cases convinced them that "normal investigative procedures" were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes. Use of the phone company's records alone is inconclusive.

The affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that

illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

> "Congress legislated in considerable detail in providing for applications and orders authorizing wire tapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. *These procedures were not to be routinely employed as the initial step in criminal investigation.* Rather, the applicant must state that and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *United States v. Giordano, supra.* (emphasis added)

The Government's position is further undermined by the activity of other crime-fighting organizations. California, among other states, deprives its policemen of electronic surveillance in all cases. This has not prevented them from successfully prosecuting gambling crimes.

Obviously electronic surveillance can facilitate criminal investigation. Other investigative techniques are usually slower and more difficult. Unless they "have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous", however, Title III does not allow wiretapping to replace them.

The Government failed in this case to satisfy 18 U.S.C. §2518 (1)(c). Its application did not adequately show why traditional investigative techniques were not sufficient in this particular case. A reviewing judge is handicapped without a full and complete statement of underlying circumstances. The Government must (1) inform him of every technique which is customarily used in police work in investigating the type of crime involved, and (2) explain why each of them has either been unsuccessful or is too dangerous or unlikely to succeed because of the particular circumstances of that case. Title III and the individual's right to privacy which it seeks to preserve demand no less.

Mere conclusions by the affiant are insufficient to justify a search warrant. *Aguilar v. Texas, supra*, or a wiretap order. More specifically, they do not provide facts from which a detached judge

or magistrate can determine whether other alternative investigative procedures exist as a viable alternative.

The trial court's order denying appellants' motions for suppression of electronic surveillance evidence is reversed, and all consolidated cases are remanded for a new trial. All evidence gathered through electronic surveillance pursuant to the original § 2518 order and its extensions shall not be admitted in subsequent proceedings.

In view of that ruling, the other issues on appeal are not reached.

REVERSED and REMANDED.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 8-11-75—400

CERTIFICATE OF SERVICE

November 24, 1975

I certify that a copy of this petition for rehearing for appellant William Capo with suggestion for rehearing en banc has been mailed to each of the following:

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